Supreme Court, U.S.
FILED
JAN 2 2001
OFFICE OF THE CLERK

(4)

No. 00-684

In The

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS, an incorporated municipality,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

JAMES J. S. JOHNSON, ESQ.
Counsel of Record

P.O. Box 2952
Dallas, Texas 75221
817-430-9305 telephone
817-430-9306 FAX

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

FACT ISSUES 1

City's Brief in Opposition often misstates various material facts that were genuinely disputed at the summary judgment level 1

ARGUMENT 2

A. Certiorari standards are met herein, especially due to conflicts in the circuits, and also due to conflicts with this Court's precedents 2

B. The Fifth Circuit's dismissal below, on Article III standing grounds, evaded conformity with this Court's doctrine in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 120 S.Ct. 693, 707-708 (2000), despite the panel's being informed of its deviation from *Laidlaw*, so the Fifth Circuit continues to misapply an *ultra vires* bar to trial-worthy Clean Water Act citizen suits 3

C. The Fifth Circuit Deviated from Rule 15's discretion limits, denoted in *Foman v. Davis*, 371 U.S. 178, 182, 192 (1962), by refusing Janiks leave to supplement their RCRA-based claim (via a "more definite statement") in a pre-trial context where Janiks' complaint had already satisfied the "notice pleading" norms of *Conely v. Gibson*, 355 U.S. 41, 47 (1957)..... 6

TABLE OF CONTENTS – Continued

Page

D. The Janiks' Rule 56(e) evidence was adequate, timely, and sufficiently "designated" for summary judgment purposes that the Fifth Circuit erred in not reversing the final summary judgment (which stated on its face that it relied on other interlocutory rulings), because the material errors within the clearly erroneous final summary judgment, as well as those incorporated in it from interlocutory rulings, were case-dispositive errors that were timely and consistently preserved at the trial court and appellate court levels 9

E. Federal preemption errors were raised below and are properly raised herein, since those errors were preserved and involve issues of reversible error .. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Conley v. Gibson, 355 U.S. 41 (1957) 6

Foman v. Davis, 371 U.S. 178 (1962) 6

Friends of the Earth v. Crown Central Petroleum Corp., 95 F.3d 358 (5th Cir. 1996)..... 3, 4, 5

Friends of the Earth v. Laidlaw Environmental Services, Inc., 120 S.Ct. 693 (2000).....3, 4, 5, 6

Patterson Farm, Inc. v. City of Britton, S.D., 22 F. Supp.2d 1085 (D.S.D. 1998) 8

Quarantino v. Tiffany & Co., 71 F.3d 58 (2nd Cir. 1995)..... 3

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III 3, 4, 5

U.S. Constitution, Article VI (Supremacy) 10

STATUTES

Clean Water Act (generally).....1, 3, 4, 5, 7, 9

33 § 1311(a)(2)(C)..... 6

33 § 1342(k)..... 6

33 § 1365(g)..... 6

Resource Conservation & Recovery Act (generally).....i, 6, 7, 8, 9

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed.R.App.P., Rule 28(j) 3

Fed.R.Civ.P., Rule 15 ..... 6, 7, 8

Fed.R.Civ.P., Rule 15(d) 3, 8

Fed.R.Civ.P., Rule 56 ..... 2, 4

Fed.R.Civ.P., Rule 56(e) 8, 9

MISCELLANEOUS OTHER AUTHORITIES

EPA-issued NPDES permit (for the City of Dallas) 4

FACT ISSUES

The City's Brief in Opposition seriously misstates material facts that were genuinely disputed at the summary judgment phase. The City generally admits the facts provided by Petitioners ("Janiks"), yet adds many more – many gerrymandered to mislead the reader. For example, with misleading sophistry the City boldly tells this Court (on its p. 7) that "there were no malfunctions or problems of any kind" that fit the Janiks' time-framed fact-pleading, yet City's own dilatorily produced monitoring reports (eventually acquired near the end of discovery) admit to a pumping failure that caused "massive build-up", the same-day that the surge basin pumps failed, causing a "runoff overload into the stormwater system", producing a City-worker-admitted "violation of permit" (the CLEAN WATER ACT/NPDES permit). This dilatorily-produced employee-admitted NPDES permit violation (caused by City pumps malfunctioning) in a **10/31/93** entry, quoted in **Cert. Petition @ p. 25**, on the very day that the Janiks' home, backyard, front and side yards, driveway, and alley storm sewer drains were flooded with thousands of gallons of City's untreated sewage waters. (*See* 5th Circuit Reply Brief, pp. 6-9.) In violation of its NPDES permit, City did not report this unpermitted discharge to the EPA; likewise, City did not report other sewage flooding problems in Dallas that appear to have been NPDES permit violative.

Moreover, City implies (p. 6) that the videotape revealed no structural defects in the sewage pipe. But, environmental engineers McElyea and Egbert disputed this "fact" at the summary judgment level. City asserts (p. 6) "roots" as the cause of City sewage wastewater

1993 flooding. But, not so – engineering experts' declarations (at the summary judgment level) disputed this. The City's untreated sewage wastewater poured into the Trinity River's tributary network, despite many eye-witness-based proofs thereof. The City says its sewage-water conveyance system uses gravity, so it is "physically impossible" for its sewer system to produce "pressurized" flooding of untreated sewage-waters (p. 6). The Janiks dispute this, based on Rule 56 declarations by eye-witnesses and engineering experts. City boldly asserts that City never had sewage wastewater overflow malfunctions like that described in the Janiks' complaint and Rule 56 declarations, – yet this is refuted by Janik proofs filed to oppose summary judgment. On all of those "fact" issues, see generally the trial court cites in Janiks' 5th Circuit Reply Brief at pp. 3-14, since City's misstatements of "fact" in its Brief to this Court mostly track similar "fact" misstatements in the Fifth Circuit. See also **Doc #131** (designating Rule 56 evidence) and Janiks' trial court objections and briefs citing such material-fact-dispute evidence, e.g., **Doc #242** (pp. 2-3, 5, 7-9, 12-16, 18, 23) and **Doc #326** (pp. 5-6, 8, 9-10, 15-25).

ARGUMENT

A. CERTIORARI STANDARDS ARE MET.

Certiorari standards are met herein, due to conflicts in the circuits, and also due to conflicts with this Court's own precedents. Despite the conclusory arguments of the City, Petitioners have documented conflicts among the

circuit courts of appeals. (See Petition for Writ of Certiorari, @ pp. 4-8 (citing cases in the 3rd, 4th, and 8th Circuits that clash with the 5th Circuit's "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) ("*Crown Central*"). Moreover, there exists a "split" in the circuits as to the proper standard for Rule 15(d) rulings, which can be – and is, in the Janiks' case, – case-dispositive. *See* Cert. Petition @ pp. 18-19, citing *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65-66 (2nd Cir. 1995) and a 9th Circuit ruling on Rule 15(d) standards. See also Cert. Petition @ pp. 18-19 (re abuse).

B. THE JANIKS HAVE ARTICLE III STANDING.

The Fifth Circuit's dismissal below, on Article III standing grounds, evaded conformity with this Court's doctrine in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 120 S.Ct. 693, 707-708 (2000) ("*Laidlaw*"), despite the panel's being informed of its deviation from *Laidlaw*. Before oral argument the Janiks became aware of a new U.S. Supreme Court ruling on Article III standing, as applied to a Clean Water Act citizen suit context, *Laidlaw*, 120 S.Ct. 693, 704, 707-708. (See Letter Brief of 5-1-2000, filed with 5th Circuit per FRAP Rule 28(j) and its related local rule.) Moreover, the *Laidlaw* precedent was emphasized as justifying a rehearing by the Fifth Circuit panel, as Petition Point #1 on pages 2-6 of the Janiks' Petition for Panel Rehearing (7-19-2000), – but the panel denied *Laidlaw*'s authority, in effect, *sub silentio*.

Laidlaw stands as a very needed and very recent clarification of Article III's standing doctrine, – distinguishing the "injury to the plaintiff" as the critical standing injury, – as opposed to "injury to the environment". (See *Laidlaw*, 120 S.Ct. at 704.) Herein the City's once-admitted violation of its Clean Water Act-mandated, EPA-issued) NPDES permit was (on 10-31-1993) the cause of personal sicknesses and of sewage-water-contaminated property losses suffered by the Janiks. So, the *Laidlaw* standing elements – (1) actual and/or imminent "injury in fact"; (2) showing that defendant's alleged conduct is "fairly traceable" as a causative agent of plaintiff's injuries;[1] and (3) redressability; – are all present in the Janiks' case. So, it is only because the Fifth Circuit has **expanded** this three-part test, **by adding to it a fourth criterion, applicable only to Clean Water Act citizen suits**, – namely, a "river interest" test. See *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) (*"Crown Central"*) (mandating "river interest") test as the legalistic test of "traceability" for Clean Water Act citizen suit cases), *followed by the trial court below in* Order of 4-16-1998 (**Doc #342**, @ pp. 2-5). But there is no such constitutional "river interest" test inherent in Article III. It is neither expressed nor implied in Article III's

---

[1] **See generally the causation evidence provided by the Janiks' experts.** Rule 56 declarations addressing causation/traceability are shown in Cert. Petition's Appendix @ pp. C-4 through C-16, in conjunction with biohazardous data @ pp. B-23 through B-25, the City's NPDES permit shown @ pp. B-26 through B-31, biocontamination data shown @ pp. C-23 through C-28, plus @ p. C-39 (*the Janiks were not the cause!*), and City's own safety data @ pp. C-40 through C-43.

plain language. There is no historical basis for saying it was intended by the Framers. In this case, both the trial judge and the panel relied on the "river interest" test of *Crown Central* to deny the Janiks' suit – and they both did so on constitutional (not statutory) grounds! Now, whether the Janiks satisfy statutory standing norms is a very different question from whether Article III's norm is met. (In this case, the Janiks easily satisfied the standing norms of both, since Congress chose to open the federal court house door, for Clean Water Act citizen suits, as far or about as far as Article III permits.) Worse, the Fifth Circuit continues to apply *Crown Central's* "river interest" bar, even after being advised of *Laidlaw's* ruling. Thus, the Fifth Circuit's *Crown Central* "river interest" test **continues to roadblock some injured citizens proving "traceability"** because the "river interest" test partially negates categories of injuries-in-fact from being deemed "failry traceable" to Clean Water Act violations. The result is that intangible injuries (such as aesthetic "river enjoyment" injuries and the like) are deemed "fairly traceable" to NPDES permit violations, but tangible injuries such as the Janiks' physical illnesses and their property losses are not. *Crown Central's* "river interest" can be (and is now) used to treat injured-in-fact plaintiffs as non-stakeholders, – as if by applying common law *jus tertii* doctrine in the name of Article III. But, as in classic cases of "combined" private nuisance/public nuisance actions,[2] the Janiks are genuine stakeholders still living at risk. As expert engineer McElyea's declaration indicates,

---

[2] See case law cited in Cert. Petition @ pp. 14-15.

the ultimate problem is still unfixed (Appendix @ C-14 through C-16).

So, the problem remains – for all served by Dallas Water Utilities, and to some extent also for all residing in Fifth Circuit states, despite *Laidlaw's* gate-keeping standards. Why? The Fifth Circuit now recognizes only "injury to the environment" and no ***"injury to human health"*** – even though the Clean Water Act was intended to promote serious care for both "the environment" and "human health", with congressionally favored enforceability by private attorneys general.[3]

C. RULE 15 RELIEF WAS UNJUSTLY DENIED.

The Fifth Circuit deviated from Rule 15's discretion limits, as such limits are denoted in *Foman v. Davis*, 371 U.S. 178, 182, 192 (1962), by refusing Janiks leave to supplement their RCRA-based claim (via a "more definite statement") in a pre-trial context, even though the Janiks' 3rd Amended Complaint had already satisfied the "notice pleading" norms of *Conley v. Gibson*, 355 U.S. 41, 47

---

[3] **See Cert. Petition's Appendix @ p. B-6** (§1311(a)(2)(c) says "such modifications [*of effluent limitations*] will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an **unacceptable risk to human health or the environment"** [*emphasis added*]); **p. B-8** (§1342(k)'s concern that NPDES permit complaince norms are overridden by §1317's standard applicable for "a toxic pollutant **injurious to human health . . . "** [*emphasis added*]); **B-12** (§1365(g) defines "citizen" suitor as **"a person or persons having an interest which is or may be adversely affected"** – *notice no mention of "river interest" limitation*).

(1957). The City misinforms this honorable Court by suggesting that the Janiks sought Rule 15 relief to "amend" their 3rd Amended Complaint. Rather, the Janiks sought – in light of the trial court's about-face on the RCRA claim – to "**CLARIFY**" its RCRA claim by supplementing the Janik pleadings, to "make a more definite statement" of the RCRA citizen's suit. The RCRA suit was pled as an alternative theory to the Clean Water Act suit. The RCRA-based count also asserted facts and legal issues inextricably intertwined with the Janiks' nuisance per se count, i.e., a RCRA violation was a strict liability basis for the nuisance being recognized, legally, as nuisance per se. This Court already has before it the Janiks' proposed "PLAINTIFFS' RCRA-RELATED SUPPLEMENT TO THEIR THIRD AMENDED COMPLAINT" – see Cert. Petition's Appendix @ p. C-18 through p. C-22 (originally filed as an exhibit 5-22-1998). The Janiks were not asking for a "fifth bite at the apple" (City, p. 17). Rather, the Janiks were seeking to clarify a RCRA-based claim for relief that was already well-pleaded in their 3rd Amended Complaint (*Accord, See* Cert. Petition's Appendix @ page C-18, cross-referencing prior complaint allegations, and @ Appendix page C-20, ¶6, noting 21 hazardous substances involved in City RCRA violations). In Janiks' Reply Brief in the 5th Circuit (of 12-24-1998), Page 3's footnote #1 noted:

> The city deceptively and unjustly **withheld these documents** showing 21+ RCRA substances in untreated city sewage wastewater, – yet the Janiks discovered this [,] via use of FOIA requests to the U.S. ENVIRONMENTAL PROTECTION AGENCY's Clean Water Act/NPDES records.

Moreover, the Janiks further complained of this discovery abuse in their Petition herein (on 10-26-2000, @ pages 21-22), which included this report of City document withholding:

> In this case, the reason for the plaintiffs' delay in pleading the names of the 21 "hazardous substances" (improperly "disposed" by the city) was that the city did not properly produce the monitoring data in discovery, despite defendant's knowledge that the citizen suit focused on defendant's discharges of pollutants into a tributary network of navigable river. *See* **Doc #348**.

This discovery abuse unjustly tainted the summary judgment ruling that is now used to thwart the Janiks' Rule 15(d) motion. This Court should notice how the Fifth Circuit's approach to Rule 56(e) clashes with the logic and result, but not with the facts, of another NPDES permit ruling, *Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp.2d 1085, 1093 (D.S.D. 1998) (city failed to produce NPDES records in discovery, so any summary judgment was unjust; city's duties to comply with record keeping requirements were not exonerated at the summary judgment level). Thus, Rule 15 supplementation of the Janik's 3rd Amended Complaint was just, to prevent a case-dispositive miscarriage of justice.

D. RULE 56(e) PROOF WAS UNJUSTLY IGNORED BY A METHOD CONTRADICTORY OF CELOTEX, AND ERRORS ON THIS POINT WERE PRESERVED.

The Janiks' Rule 56(e) evidence was ignored – even though it was adequate, timely, and sufficiently "designated" for summary judgment purposes that the Fifth Circuit erred in not reversing the final summary judgment (*which incorporated some interlocutory summary judgment rulings*), because the material errors within the final summary judgment, as well as all rulings incorporated in it, were reversible errors that were each preserved at the trial court and at the appellate levels. (*See generally* Cert. Petition @ 22-27 and its **Appendix, pp. C-1 through C-39,** esp. pp. C-1 through C-3.)

E. FEDERAL PREEMPTION ERRORS JUSTIFY RELIEF.

Federal preemption issues – inextricably intertwined with the case-dispositive summary judgment rulings below – were raised below and such errors (i.e., errors based on federal preemption issues) were properly preserved. The City's Brief in Opposition, @ p. 21, links the trial court's dismissal of the Janiks' nuisance per se claims with a federal preemption problem. **City is very close to being accurate here.** The Janiks' nuisance per se claims were dismissed by the trial court, by summary judgment, without any meaningful consideration that a Clean Water Act/NPDES permit violation (or a RCRA violation) can serve as the "wrongful act or omission"

element in a codified or uncodified state tort law regarding nuisance. (Codified and uncodified nuisance torts were alleged by the Janiks.) It perpetrates a mockery of the Supremacy Clause – as is happening in this case – when that state law is construed **at the summary judgment phase** as discriminating between a "wrongful act or omission" defined by state law versus violations of federal environmental law, with only federal laws being deemed outside of the state statute's definition of "wrongful act or omission". The federal preemption problem was raised in the trial court and appellate levels. See, e.g., Janiks' 5th Circuit Appellants' Brief @ pp. 16, 21, including cases cited on p. 16; Doc #327 @ pp. 8-11 (federal law preempts state tort law), shown @ Tab S of Record Excerpts; Doc #345 @ 2 (federal law preempts state tort law), @ Tab T of Record Excerpts.

CONCLUSION

Writ of certiorari should issue herein.

Respectfully submitted,

JAMES J. S. JOHNSON, ESQ.
Counsel of record for Petitioners
P.O. Box 2952, Dallas, Texas 75221
817-430-9305; 817-430-9306 FAX
Dated: *December 29, A.D. 2000*